Conflicts of Laws—Statute of Limitations—Use of Statutory Period of Debtor's Domicile—Defendant executed a note in California which was payable in Minnesota. After the note matured it was assigned to plaintiff by the owner who had been a resident of Minnesota at the time of maturity.[1] At all times defendant was a resident of California. After the California statute of limitations [2] had run, plaintiff sued on the note in Minnesota. A Minnesota statute barred recovery on an action which was barred "by the law of the place where it arose." [3] *Held* (two justices dissenting), that the action arose in California where the defendant was domiciled at the time the note was payable and being barred there, is barred in Minnesota. *Pattridge v. Palmer,* 277 N. W. 18 (Minn. 1937).

The almost universal adoption of tolling statutes,[4] which precluded the statute of limitation of the forum from running while the defendant was absent from the jurisdiction, gave rise to the probability that no temporal bar would be applicable to the debt of a "nomadic defendant".[5] This led thirty-three states to adopt "borrowing" statutes such as the one involved in the instant case.[6] However, the respective courts have adopted different interpretations of where the cause of action arose for the purpose of "borrowing" the statute of that jurisdiction. The majority of courts and authorities agree that the cause of action arises at the place of performance.[7] This was the rule advocated by the dissenting justices.[8] The rule has the advantage of certainty [9] and would seem to be in accord, by analogy, with the principle applied to tort actions, that the cause arises where the injury takes place regardless of where the acts giving rise to it took place.[10] However, some courts have held that the cause of action arises at the domicile of the defendant at the time of performance,[11] or at any place where he later resided.[12] This has been adopted in some states by statute.[13] The rationale seems to be that since the plaintiff could then have brought an action in that jurisdiction, the cause of action arises there, at least for the purpose of the statute of limitations of that jurisdiction. Finally, at least one other court has committed itself to the principle set forth by the instant court, that the cause arises in both places.[14] But this curious

1. Actually, though unimportant to the principle involved, plaintiff had acquired a one-third interest in the note before maturity, which under an exception in the statute, he was allowed to recover. However, here involved is the two-third interest he acquired after maturity.

2. CAL. CODE CIV. PROC. (Deering, 1931) § 337.

3. MINN. STAT. (Mason, 1927) § 9201.

4. Louisiana is the only state without such a statute. Legis. (1935) 35 COL. L. REV. 762. This note is an excellent treatment of the statutes in this field.

5. *Id.* at 764; CHEATHAM, DOWLING, AND GOODRICH, CASES AND MATERIALS ON CONFLICTS OF LAWS (1936) 385.

6. Legis. (1935) 35 COL. L. REV. 764; for a collection of some citations to statutes see 1 BEALE, CONFLICTS OF LAWS (1935) 1622, n. 1.

7. Cases cited instant case at 20; RESTATEMENT, CONFLICTS (1934) § 370; 2 BEALE, CONFLICTS OF LAWS, § 370.1.

8. Instant case at 20.

9. 2 BEALE, CONFLICTS OF LAWS, § 370.1, 1274.

10. Fischl v. Chubb, 30 Pa. D. & C. 40 (1937), 86 U. OF PA. L. REV. 429 (1938).

11. Strong v. Lewis, 204 Ill. 35, 68 N. E. 556 (1903); Drake v. Bigelow, 93 Minn. 112, 100 N. W. 664 (1904).

12. Wing v. Wiltsee, 47 Nev. 350, 223 Pac. 334 (1924).

13. Legis. (1935) 35 COL. L. REV. 762, 766.

14. Hyman v. McVeigh, 10 Chi. L. N. 157 (Ill. 1878); instant case at 19. This would seem contrary to the doctrine that a cause of action can arise in only one place. See McKee v. Dood, 152 Cal. 637, 641, 93 Pac. 854, 856 (1908).

theory was not necessary to the instant holding, the result being the same as if the court had followed the minority rule and held that the action arose only in California. Though recognizing that if the problem were one of first impression a different result might be reached and that perhaps its reasoning was fallacious, the court felt bound to decide as it did because of a previous Minnesota decision.[15]

Constitutional Law—State Debt Limitations—Pledge of Gasoline and Motor Vehicle Taxes Not within "Special Fund Doctrine"—The plaintiff sought to enjoin the issuance by the state of highway revenue anticipation notes for road construction purposes under a statute pledging for payment of the notes solely a portion of gasoline and motor vehicle taxes, on the ground that, since the notes were a debt of the state, the transaction exceeded the constitutional state debt limitation of $400,000. *Held* (four justices dissenting), that the injunction should be granted, in that the notes constituted a debt of the state within the meaning of the constitutional limitation, because they were payable not from the proceeds of a self-liquidating project but from a fund derived from taxes. *Boswell v. State*, 74 P. (2d) 940 (Okla. 1937).

It is an almost universal rule that borrowings by states or their properly authorized subdivisions [1] to be invested in self-liquidating projects such as utilities and repaid solely from the revenues of those projects are not within the zone of constitutional or statutory debt limitations.[2] The courts reason that such obligations are not general obligations of the borrowing government[3]; and that since the obligee is to be repaid solely from a "special fund" to be derived from revenues of the project and not from taxation,[4] the claim is not a "debt" within the meaning of the limitation. Throughout the decisions there is an underlying idea that the purpose of the limitation is to curb the inescapable burden of taxation.[5] The courts reason that if the burden is in the form of a higher charge by a utility for its services which the taxpayer is theoretically free to accept or reject,[6] the thing sought to be prohibited and hence the prohibition itself is absent. The distinction between obligations to be paid by taxes and obligations to be paid by higher public utility rates may be a distinction without a difference,[7] particularly as in the instant case where the class to benefit directly from the money borrowed are the individuals who will pay it back in taxes.[8] Hence the fact that the liability of the state

15. Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162 (1892). However, this case seemed to hold that the cause could arise *only* at the defendant's domicil while the instant court admits it also arose at the place of performance. If this be correct, then the *Luce* case expressly did not apply to a cause that arose in Minnesota. *Id.* at 361, 51 N. W. at 1163.

1. No reason appears for a distinction between debt limitations imposed on the state and those imposed on subdivisions of the state. Hence only one state, New York, has accepted the "special fund doctrine" as to municipal borrowing and refused to recognize it as to state borrowing. See Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations* (1937) 37 COL. L. REV. 177, 211.

2. Utah Power & Light Co. v. Provo City, 74 P. (2d) 1191 (Utah, 1937) (rule applied to municipal debt limitation); Williams & Nehemkis, *supra* note 1, at 189 (with an Appendix at pp. 209-211 presenting an exhaustive list of authorities adopting the "special fund doctrine" both as to state and municipal borrowings).

3. Shelton v. Los Angeles, 206 Cal. 544, 275 Pac. 421 (1929).

4. Hight v. City of Harrisonville, 328 Mo. 549, 41 S. W. (2d) 155 (1931).

5. *In re* Senate Resolution No. 2, 94 Colo. 101, 31 P. (2d) 325 (1933); see Williams & Nehemkis, *supra* note 1, at 189; Note (1937) 85 U. OF PA. L. REV. 518, 521. But see Legis. (1933) 18 IOWA L. REV. 269, 274.

6. See Utah Power & Light Co. v. Provo City, 74 P. (2d) 1191, 1197 (Utah, 1937).

7. This proposition is stated in a dissenting opinion in the instant case at 955.

8. It would seem that in theory at least every expenditure from tax revenues benefits the individual taxpayer directly or indirectly. Moses v. Meier, 148 Ore. 185, 35 P. (2d) (1934) (holding that funds borrowed for relief of unemployment to be repaid from the profits of state

is limited to a special fund to be derived from a particular source of revenue would itself be the signal for the application of the "special fund doctrine" by some courts.[9] A further justification for refusing to invoke debt limitations in the case of debts to be liquidated by excise taxes is that the draftsmen of the limitations intended them to apply only where the "debt" is to be paid by added property taxes and not where it is to be paid out of excise taxes.[10] There may be some basis for this theory in a state in which the limitation is imposed in terms of a percentage of the value of property in the state,[11] but this reasoning could not be applied in the instant case where the limitation is fixed in terms of dollars and cents. And in any event it seems obvious that if the purpose of debt limitations is to limit the burden of taxation as is generally conceded,[12] that purpose will be defeated by applying the limitation only where a property tax is involved or by invoking the "special fund doctrine" in cases of obligations to be repaid from other tax revenues.[13]

Constitutional Law—Taxation of Income from Government Oil Lease—The State of Wyoming leased school lands to an oil company, reserving a royalty to the state. The oil company executed a declaration of trust by which it agreed to hold an undivided 50 percent. interest in the lease and the net proceeds to be realized therefrom for the benefit of petitioner. *Held,* (Butler, McReynolds, JJ., dissenting; Cardozo, Reed, JJ., not participating) that the income received by the petitioner from the sale of the oil under this trust agreement is taxable because there is no direct or substantial interference with a state instrumentality. *Mountain Producers Corp. v. Commissioner,* U. S. Sup. Ct. (1938) 5 U. S. L. WEEK 797.

In reversing the decision of the circuit court, criticized in a recent issue of the REVIEW,[1] the Supreme Court has finally settled the controversy created by the *Gillespie*[2] and *Coronado*[3] cases, and has partially destroyed the doctrine of governmental immunity from non-discriminatory taxes by saying: "We are convinced that the rulings in Gillespie v. Oklahoma, . . . and Burnet v. Coronado Oil & Gas Company . . . are out of harmony with correct principles and

liquor stores were not within the debt limitation) indicates that it is not the fact that the recipient of a benefit is to pay for it that causes application of the "special fund doctrine". In the last analysis, the courts are not concerned with the benefit, but with the burden.

9. Briggs v. Greenville County, 137 S. C. 288, 135 S. E. 153 (1926); Ajax v. Gregory, 177 Wash. 465, 32 P. (2d) 560 (1934).

10. State *ex rel.* Boynton v. Kansas State Highway Comm., 138 Kan. 913, 28 P. (2d) 770 (1934).

11. State *ex rel.* Capital Addition Bldg. Comm. v. Connelly, 39 N. M. 312, 46 P. (2d) 1097 (1935). *Contra: In re* Senate Resolution No. 2, 94 Colo. 101, 31 P. (2d) 325 (1933). An equally rational explanation is that the draftsmen chose property values not because they had property taxes in mind but because property value was a satisfactory measure of wealth on which to base a debt limitation. See State *ex rel.* Capital Addition Bldg. Comm. v. Connelly, 39 N. M. 312, 339, 46 P. (2d) 1097, 1113 (1935) (dissenting opinion).

12. Even in cases in which the "specific fund doctrine" is applied to borrowing to be repaid by taxation, it is conceded that the limitation was imposed to curb taxation. See Briggs v. Greenville County, 137 S. C. 288, 301, 135 S. E. 153, 157 (1926).

13. *In re* Senate Resolution No. 2, 94 Colo. 101, 31 P. (2d) 325 (1933); State *ex rel.* Diederichs v. State Highway Comm., 89 Mont. 205, 296 Pac. 1033 (1931).

1. 92 F. (2d) 78 (C. C. A. 10th, 1937), 86 U. OF PA. L. REV. 306 (1938).

2. Gillespie v. Oklahoma, 257 U. S. 501 (1922) (lessee's profits from federal oil lease held immune from state taxation).

3. Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 (1932) (lessee's profits from state oil lease held immune from federal income tax).

accordingly they should be, and they now are, overruled." [4] Such a result is not too surprising in view of the vigorous dissent in the *Coronado* case by Brandeis, Stone, Roberts and Cardozo, recommending that the *Gillespie* case be overruled. The finality of the present decision is infinitely preferable to a disposition of the case, which would reach the same result, by distinguishing the situation at issue, where the income was received by a beneficiary of a trust declared by the lessee, from one where the income accrued to the lessee itself,[5] on the doubtful ground that the burden on the government was more remote. However, unmentioned in the instant opinion but affected by it, are the *Panhandle* [6] and *Indian Motorcycle* [7] cases wherein taxes on sales to the government were held invalid.[8] In the *Panhandle* case the majority opinion put great reliance on the *Gillespie* case, but a strong dissent supported by Brandeis, Stone, Holmes and McReynolds thought the *Gillespie* case had carried the immunity doctrine far enough.[9] Therefore, with the new Court [10] and the present overruling of the *Gillespie* case, it would appear that sales to a government might now be taxed. Also, it might be recalled that the concurring opinion by Stone and Cardozo in the *Brush* case along with Roberts' vigorous dissent, invited a challenge to revise the doctrine of immunity of government employees from an income tax.[11] Indeed, there is a possibility that a successful attack even on the immunity of income from government securities is not far distant, and that the governmental immunity of the future will be limited to discriminatory taxes.[12]

Constitutional Law—Validity of State Regulation of Weight and Width of Motor Trucks in Interstate Commerce—A state statute [1] prohibited the use of the state highways to motor trucks whose width was in excess of ninety inches or whose gross weight was in excess of twenty thousand pounds. *Held* (reversing the district court), that the statute is not superseded by the Federal Motor Carrier Act [2] and is valid under the due process and commerce clauses. *South Carolina Highway Dep't v. Barnwell Bros.*, 58 Sup. Ct. 510 (1938).

Where Congress has not regulated the use of the highways, it has been established that a state may regulate motor carriers in interstate commerce, provided it does not discriminate against them and the method of regulation is reasonably adapted to an authorized exercise of its police power.[3] The instant Court in following this reasoning indicated that the only effect of the commerce

4. Instant case at 799.
5. *Cf.* Hobart Iron Co. v. Commissioner, 83 F. (2d) 25 (C. C. A. 6th, 1936), *cert. denied*, 299 U. S. 543 (1936).
6. Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928).
7. Indian Motorcycle Co. v. United States, 283 U. S. 570 (1931).
8. *Cf.* James v. Dravo Contracting Co., 302 U. S. 134 (1937), 86 U. OF PA. L. REV. 308 (1938).
9. See Boudin, *Taxation of Governmental Instrumentalities* (1934) 22 GEO. L. J. 254, 279.
10. Justices Black and Reed replaced Justices Van Devanter and Sutherland.
11. Brush v. Commissioner, 300 U. S. 352 (1936).
12. Lowndes, *Taxing the Income from Tax-Exempt Securities* (1938) 32 ILL. L. REV. 643.

1. S. C. CODE (Supp. 1936) § 1624-1 (4) & (7).
2. 49 STAT. 543 (1935), 49 U. S. C. A. § 301 *et seq.* (Supp. 1937). For a discussion of the supersedure point, see Note (1938) 86 U. OF PA. L. REV. 532.
3. To protect its property interests in the roads. Morris v. Duby, 274 U. S. 135 (1927); Sproles v. Binford, 286 U. S. 374 (1932). Note (1929) 77 U. OF PA. L. REV. 904. To promote safety. Morris v. Duby, 274 U. S. 135, 143 (1927). To avoid congestion. Bradley v. Public Util. Comm., 289 U. S. 92 (1933).

clause is to prevent discrimination and that, since the restrictions equally affect intrastate carriers, the due process clause is considered sufficient protection for the interstate carrier against unreasonable burden.[4] The Court refused to follow the district court's distinction that the restrictions, although valid under the due process clause as a reasonable exercise of the state police power, were invalid under the commerce clause since they unreasonably deprived interstate carriers of the use of an integrated system of trunk roads capable of carrying ninety-six inch trucks.[5] There seems to be some justification [6] for this distinction between what is reasonable under the two clauses since over eighty-five percent of the trucks used in interstate commerce are ninety-six inches wide [7] and it is apparently easier to use smaller trucks in intrastate commerce than in the longer interstate hauls. However it is essentially a question of policy whether uniform weight and width requirements are necessary, and since Congress in the Motor Carrier Act refused to set such requirements by merely authorizing an investigation of their need,[8] the Supreme Court's decision seems proper. Nevertheless, since the road beds are the property of the state [9] there is the resulting question [10] as to whether Congress may under the Fifth Amendment deprive the state of this property interest by setting maximum requirements in excess of those of the state, already upheld as reasonable.[11] The Court indicated [12] that Congress has the plenary power to curtail to *some extent* the state's regulatory power. But having found that the ninety inch restriction was reasonably necessary to protect the roadbed it will be more difficult to find that a ninety-six inch requirement does not unreasonably deprive the state of its property, particularly where there is the additional factor that the road is a state instrumentality.[13]

Constitutional Law—Validity of the Tennessee Valley Authority— Eighteen power companies operating in areas affected by the TVA program, brought suit to enjoin further construction of the Norris, Wheeler, and other dams, and their operation by the TVA for the generation and sale of electric power. *Held,* that the Act [1] and the program of the TVA are within the constitu-

4. Instant case at 515.

5. Barnwell Bros. v. South Carolina State Highway Dep't, 17 F. Supp. 803 (E. D. S. C. 1937). The court's theory was that while the limitations were reasonable as to about half the state roads it was unreasonable to deprive interstate commerce of the use of the balance of the roads. It also held that the gross weight limitation had no reasonable scientific relation to the preservation of the highways. *Id.* at 810. See Note (1938) 36 MICH. L. REV. 443, discussing scientific weight requirements.

6. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937) 98, 224.

7. Instant case at 513.

8. 49 STAT. 566 (1935), 49 U. S. C. A. § 325 (Supp. 1937).

9. Morris v. Duby, 274 U. S. 135 (1927).

10. See Co-Ordinator Eastman's testimony that the Motor Carrier Act did not undertake to cover the weight and width requirements which involved "not only a question of fact as to what the regulation should be but also . . . how far the Federal Government has power to interfere with the exercise of the police power by the States with respect to the use of their highways." *Hearings before the Committee on Interstate Commerce on S-1629,* 74th Cong. (1934) 92. Cited in Barnwell Bros. v. South Carolina State Highway Dep't, 17 F. Supp. 803, 808 (1937).

11. See Kauper, *Federal Regulation of Motor Carriers* (1934) 33 MICH. L. REV. 239, 248 *et seq.,* reaching a conclusion opposite to that reached by the American Bar Association in 1933, *id.* at 249, n. 144.

12. Instant case at 516.

13. See Kauper, *supra* note 11.

1. THE TENNESSEE VALLEY AUTHORITY ACT, 48 STAT. 58 (1933), *as amended by* 49 STAT. 1075 (1935), 16 U. S. C. A. § 831 (Supp. 1937).

tional powers granted to Congress to provide for national defense, to control interstate commerce, and to dispose of products incidental to the use of government property. *Tennessee Electric Power Co. v. Tennessee Valley Authority,* U. S. Dist. Ct., E., Tenn., (1938) 5 U. S. L. WEEK 588.

In *Ashwander v. Tennessee Valley Authority,*[2] the Supreme Court upheld the validity of a contract for the disposal of electricity generated at the Wilson Dam, which was authorized by the National Defense Act of 1916.[3] The basis of that decision was that the construction of the dam was a valid exercise of the war powers of Congress, and that Congress had the power to dispose of the electricity not needed for defense purposes. However, the Court in that case expressly recognized the principle that "the Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government.' "[4] In the instant case, the power of Congress to build the additional dams authorized by the Tennessee Valley Authority Act was attacked. The district court, in upholding the Act, based its decision upon its finding of fact that the primary purpose of the statute was to carry out the constitutional power of Congress to aid navigation[5] and provide flood control[6] under the Commerce Clause,[7] and to provide for national defense.[8] It was said that the production and sale of electricity was incidental to the main purpose.[9] It is difficult to find support for such findings,[10] and writers have generally reached the opposite conclusion.[11] However, it is debatable whether it was necessary for the instant court to base its decision on such questionable findings of fact; for in conflict with the principle that the primary purpose of a statute must be to accomplish an authorized act,[12] is the view that a court should uphold an act which appears on its face to be an exercise of some constitutional powers. Since the instant act purports to create a constitutional program,[13] it could have been sustained had the court limited itself to an examination of the wording of

2. 297 U. S. 288 (1936), 49 HARV. L. REV. 1004, 84 U. OF PA. L. REV. 787.

3. 39 STAT. 215 (1916), 50 U. S. C. A. § 79 (1928).

4. Chief Justice Hughes in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 326 (1936), quoting Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 423 (U. S. 1819).

5. Gibbons v. Ogden, 9 Wheat. 1, 190 (U. S. 1824) (leading case); South Carolina v. Georgia, 93 U. S. 4 (1876); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913).

6. Cubbins v. Mississippi River Comm., 241 U. S. 351 (1916).

7. U. S. CONST. Art. I, § 8, cl. 3.

8. U. S. CONST. Art. I, § 8, cl. 11-16.

9. Were this the case, the sale of electricity would be valid as a disposal of government property. See U. S. CONST. Art. IV, § 3, and cases cited by counsel in Arizona v. California, 283 U. S. 423, 434 (1931).

10. The ". . . navigation improvements could be effected by a series of low dams, not suitable for water power purposes, at a cost of only $75,000,000." Note (1935) 48 HARV. L. REV. 806, 813, n. 42, citing H. R. Doc. No. 328, Pt. 1, 71st Cong., 2d Sess. (1930) 92, at 97-101. Chairman Morgan of the TVA estimated the cost of the project at $310,000,000 in 5 years. Welch, *Constitutionality of the Tennessee Valley Project,* (1935) 23 GEO. L. J. 389, at 403. Furthermore, ". . . the total present American nitrogen production could be exceeded with a power requirement of . . . only 16% of the proposed ultimate annual output. . . ." Note (1935) 48 HARV. L. REV. 806, 809, n. 19. It should be noted that the original act contained no specific provisions for improvement of navigation. These were added later in 49 STAT. 1075 (1935), 16 U. S. C. A. § 831c (j) (Supp. 1937). See Pritchett, *The Development of the Tennessee Valley Authority Act* (1938) 15 TENN. L. REV. 128, 138.

11. See, for example, Clothier, *The Federal Water Power Program* (1935) 84 U. OF PA. L. REV. 1, at 17; Welch, *supra* note 10, at 406; Note (1935) 48 HARV. L. REV. 806, 814.

12. See United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 at 73 (1913).

13. The preamble of the Act states its purpose to be to maintain the government property at Muscle Shoals ". . . in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters. . . ." 48 STAT. 58 (1933), 16 U. S. C. A. § 831 (Supp. 1937).

the statute. Precedence for judicial disregard of the basic purpose of an act can be found in *Arizona v. California*[14] where Mr. Justice Brandeis stated: "Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not enquire."[15] Nevertheless, it should be realized that either the disregard of the real purpose of an act or the use of weighted findings of fact is merely a judicial device for evading what is sincerely felt to be an outmoded constitutional restriction.[16] The effect of either rationalization is to decide that the federal government is authorized to produce and market electricity. If the courts feel it is impossible to decide this directly, a constitutional amendment would seem the only honest solution.[17]

Contracts—Application of Promissory Estoppel Where Promisor Relies upon Promisee's Gratuitous Promise to Release—Plaintiff leased a store to defendant and *X* as partners. Later plaintiff orally promised to release defendant so that the latter might enter business for himself free from obligation, *X* agreeing to assume full liability thereafter. Upon *X*'s default plaintiff sought judgment against defendant for the rent. *Held,* that plaintiff was estopped from enforcing the lease against the defendant since the latter had acted in reasonable reliance on the former's promise to release, and enforcement of the lease would work an injustice upon defendant. *Fried v. Fisher,* 196 Atl. 39 (Pa. 1938).

The traditional doctrine that consideration is a requisite to the enforceability of a promise has been the source of much confusion to courts confronted with situations which involve hardship to a promisee.[1] The result in contract law has been three-fold: (1) refusal to enforce the promise[2]; (2) enforcement by ingenious extension of the doctrine of consideration[3]; (3) enforcement by recognition of an exception to consideration in the principle of "promissory estoppel".[4] The courts have applied the last-mentioned principle to a variety of situations[5]; but application seems most justifiable, and has been most

14. 283 U. S. 423 (1931).

15. *Id.* at 455. *Cf.* Smith v. Kansas City Title Co., 255 U. S. 180, 210 (1921).

16. For an account of the attempts of Congress to dispose of the Muscle Shoals problem, see Pritchett, *The Development of the Tennessee Valley Authority Act* (1938) 15 TENN. L. REV. 128.

17. For a suggested constitutional amendment which would permit the government to generate electric power, see Welch, *supra* note 10, at 417. Counsel for the Tennessee Electric Power Co. have announced that they will seek an immediate determination of the instant case by the Supreme Court. Phila. Legal Intelligencer, Jan. 24, 1938, p. 8, col. 1.

1. 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 139; Llewellyn, *What Price Contract?—An Essay in Perspective* (1931) 40 YALE L. J. 704, 741.

2. Baird Co. v. Gimbel Bros., 64 F. (2d) 344 (C. C. A. 2d, 1933); Meyerson v. New Idea Hosiery Co., 217 Ala. 153, 115 So. 94 (1927); Comfort v. McCorkle, 149 Misc. 826, 268 N. Y. Supp. 192 (Sup. Ct. 1933).

3. Rousseau v. Call, 169 N. C. 173, 85 S. E. 414 (1915); Allegheny College v. National Chautauqua Bank, 246 N. Y. 369, 159 N. E. 173 (1927) (doctrine of promissory estoppel upheld in dictum, however). See Corbin, *Recent Developments in the Law of Contracts* (1937) 50 HARV. L. REV. 449, 454. See also Note (1933) 20 VA. L. REV. 214, 219 and authorities cited there in ns. 30-33.

4. See authorities cited *infra* note 5 and also Allegheny College v. National Chautauqua Bank, 246 N. Y. 369, 372, 159 N. E. 173, 174 (1927), 76 U. OF PA. L. REV. 749 (1928), 13 CORN. L. Q. 270; Note (1928) 27 MICH. L. REV. 88.

5. *E. g.,* charitable subscriptions, contracts arising out of family relationships, oral contracts for the sale of land, and even to prevent the revocation of certain licenses (minority view). See 1 WILLISTON, CONTRACTS § 139. However, the weight of authority is presently opposed to the general application of the doctrine. *Id.* ns. 7 and 8. Application has generally been refused to business transactions where the promise ought to be enforced creates a new

prevalent, in cases involving promises to waive rights to arise in the future.[6] In such instances it seems the only means of avoiding injustice unless the courts insist upon stretching the doctrine of consideration. In this type of case the promise is advanced purely as a defensive measure: either to prevent a defense to an action on a contract (e. g., by showing a promise to waive the statute of limitations[7]), or to prevent enforcement of an obligation. The principal case is an extreme example of the latter in that here the plaintiff released defendant from his entire obligation under the contract rather than from one incidental to the main promise. Ordinarily complete releases are treated as enforcible only if supported by consideration.[8] Although the instant result may seem equitable, the advisability of enforcing gratuitous promises has been questioned, and even the authorities that have upheld them have disagreed as to the rationale of such a procedure.[9] The principle objection to promissory estoppel is that its application will greatly extend liability on promises and eventually thrust aside the doctrine of consideration. However, it is for just this inability to extend liability under the requisite of consideration that civil law authorities have criticized the common law.[10] It has even been suggested that the enforceability of a promise depend entirely upon the established intent of the parties, consideration

obligation rather than a modification of a right to arise in the future. Baird Co. v. Gimbel Bros., 64 F. (2d) 344 (C. C. A. 2d, 1933); Comfort v. McCorkle, 149 Misc. 826, 268 N. Y. Supp. 192 (Sup. Ct. 1933), 82 U. OF PA. L. REV. 648 (1934); Union Trust Co. v. Long, 309 Pa. 470, 164 Atl. 346 (1932). But *cf.* Langer v. Superior Steel Co., 105 Pa. Super. 579, 161 Atl. 571 (1932), *rev'd on other grounds*, 318 Pa. 490, 178 Atl. 490 (1935); Trexler's Estate, 27 Pa. D. & C. 4 (1936); see Curtis Candy Co. v. Silberman, 45 F. (2d) 451, 453 (C. C. A. 6th, 1930).

6. Lusk, Inc. v. Universal Credit Co., 164 Miss. 693, 145 So. 623 (1923); Saunders v. Galbraith, 40 Ohio App. 155, 178 N. E. 34 (1931), 80 U. OF PA. L. REV. 594 (1932); Cameron v. Townsend, 286 Pa. 393, 133 Atl. 632 (1926); Keystone Dairies v. Ricci, 28 Pa. D. & C. 501 (1937); Vogel v. Shaw, 42 Wyo. 333, 294 Pac. 687 (1930), 75 A. L. R. 650 (1931). See 1 WILLISTON, CONTRACTS § 139, ns. 10 and 11. *Contra:* Shapley v. Abbott, 42 N. Y. 443 (1870).

7. Stearns Co. v. United States, 291 U. S. 54 (1933); Springfield v. Demming, 215 Mo. App. 309, 252 S. W. 91 (1923); Crawford v. Winterbottom, 88 N. J. L. 588, 96 Atl. 497 (1916). Under RESTATEMENT, CONTRACTS (1932) §§ 86 and 87 such promises are enforceable irrespective of consideration or estoppel.

8. Metcalf v. Kent, 104 Ia. 487, 73 N. W. 1037 (1898); George v. Lane, 80 Kan. 94, 102 Pac. 55 (1909); Northwestern Nat. Bank v. Great Falls Opera House, 23 Mont. 1, 57 Pac. 440 (1899); see 3 WILLISTON, CONTRACTS §§ 679, 690, to the effect that consideration is usually essential unless to enforce the original obligation would "operate as a fraud". See EWART, WAIVER DISTRIBUTED (1917) 142 *et seq.* with respect to the questionability of classifying this situation as one of waiver. Since the defendant here gave up his rights under the contract, a *mutual rescission* might have been found, the consideration being the mutual promises of the parties to forego their rights under the contract. See 3 WILLISTON, CONTRACTS (1920) § 1826.

9. As indicated, a number of courts have enforced them in contract on the basis of promissory estoppel. See Note (1923) 23 COL. L. REV. 573. The instant case suggests that this doctrine is not so much one of contract as an application of the general principle of estoppel to a particular type of situation. Some courts have treated it as a "species of consideration", or as a "substitute for, or exception to" such. See instant case at 41 and 42, n. 5. As to the treatment of such promises in torts see Arterburn, *Liability for Breach of Gratuitous Promises* (1927) 22 ILL. L. REV. 161. As for a a classification *sui generis* see Note (1933) 20 VA. L. REV. 214, 215. See also Beale, *Gratuitous Undertakings* (1891) 5 HARV. L. REV. 222.

10. For an excellent comparison of the common law doctrine of consideration and the civil law doctrine of *causa* see Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 YALE L. J. 621, where it is pointed out that the civil law principle is broader in scope than our own, and under its gratuitous promises, even though oral, would be actionable up to a certain amount on the grounds that the purpose (*motif*) for which the promise is made constitutes a sufficient *causa*. *Id.* at 632. For a more recent criticism of our doctrine which includes a discussion of § 90 of the *Restatement of Contracts*, as compared with the continental principle, see MADRAY, DES CONTRATS D'APRÈS LA RÉCENTE CODIFICATION PRIVÉE FAITE AUX ÉTATS-UNIS (1936) 74.

or no.[11] At all events, there is good reason for courts to regard consideration not as an absolute requisite to obligation,[12] and to be hospitable to exceptions to the doctrine as long as they are reasonably well defined. The danger in the recognition of promissory estoppel lies in its being too loosely applied. In view of this, the *Restatement of Contracts* has limited its application by the requisites that the promise must have reasonably induced action of a substantial and definite nature, and that injustice to the promisee can be avoided only by enforcement thereof.[13] It is significant that Pennsylvania, in adopting the *Restatement* rule, has done so with strict attention to its safe-guards.[14]

Contracts—Moral Obligation of a Married Woman Accommodation Indorser as Consideration for Her Promise Made After Discoverture—A Pennsylvania statute [1] provides that a married woman "may not become accommodation indorser, maker, guarantor or surety for another." The defendant, after the death of her husband, gave her promissory note to the plaintiff in renewal of her husband's note on which she was accommodation indorser. *Held,* that the indorsement of the first note, although legally invalid as to the defendant because she was under coverture at the time, imported a moral obligation, which was a sufficient consideration to support defendant's renewal note. *Vineland Nat. Bank & Trust Co. v. Kotok,* 195 Atl. 750 (Pa. Super. 1937).

In some situations [2] the courts will enforce a promise to pay a debt even in the absence of present consideration, but this generally is not true where the contract giving rise to the debt was void *ab initio*.[3] The statutory provision in question would seem to make a married woman's suretyship absolutely void.[4] Nevertheless, the instant court enforced the promise made after discoverture and in doing so, curiously enough, relied upon the doctrine of moral obligation as con-

11. Lorenzen, *supra* note 9, at 641 *et seq.*

12. The doctrine of consideration seems to have been imported into the law as a technical requisite to the action of assumpsit and has come to be treated as a *quid pro quo* merely through the similarity of the latter to the action of debt. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 7. One early case viewed consideration as evidence only, Pillans v. Van Mierop, (1765 K. B.), 3 Burr. 1663, although this was overruled in Rann v. Hughes, (1778 K. B.) 7 T. R. 350 note. See UNIFORM WRITTEN OBLIGATIONS ACT, PA. STAT. ANN. (Purdon, 1930) §§ 1-8, Note (1928) 76 U. OF PA. L. REV. 580.

13. RESTATEMENT, CONTRACTS (1932) § 90. An additional protection to the promisor lies in the privilege to revoke before his promise has been relied upon. *Id.* at § 88 (2); 3 WILLISTON, CONTRACTS § 689, n. 14. It also appears that the meaning of "injustice" was purposely left indefinite. See Williston's comments on this point in 4 AM. L. INST. PROC., APPENDIX (1926) 85 *et seq.*

14. See instant case at 43. As a further indication that the doctrine will not be loosely applied: Union Trust Co. v. Long, 309 Pa. 470, 164 Atl. 346 (1932) (application refused on grounds there was no reliance or waiver of rights); New Eureka Amusement Co. v. Rosinsky, 126 Pa. Super. 444, 191 Atl. 412 (1937); see Lusk, Inc. v. Universal Credit Co., 164 Miss. 693, 698, 145 So. 623, 624 (1932). For the situation in Pennsylvania previous to publication of the *Restatement* see RESTATEMENT, CONTRACTS, PA. ANNOT. (1933) § 90.

1. PA. STAT. ANN. (Purdon, 1930) tit. 48, § 32.

2. E. g., where recovery on a contract has been barred by a discharge in bankruptcy, by the Statute of Limitations, by infancy, by the non-performance of "unimportant" conditions in insurance policies, etc. These types of cases are frequently decided without regard to moral obligation. For a discussion of the so-called "old" and "new" views and the Restatement of Contracts view, in connection with these cases, see 1 WILLISTON, CONTRACTS (Rev. ed. 1936) §§ 196-204A.

3. See, e. g., Ludlow v. Hardy, 38 Mich. 690 (1878).

4. See First Nat. Bank v. Crawford, 8 Pa. D. & C. 423, 424 (C. P. 1925); Reader, *Married Women's Contracts of Suretyship* (1934) 38 DICK. L. REV. 230.

sideration, which has not only been obsolete in most states for some time [5] but has in recent years been practically unused even in Pennsylvania, at one time considered a leading advocate of the doctrine. Moreover, the result of this case is to revitalize this State's unique view of the coverture cases, which were at variance with the majority even while the use of the doctrine of moral consideration was still widespread. Beginning with the leading English case of *Eastwood v. Kenyon,*[6] the dogma existed both in England and in the majority of jurisdictions in this country, that the moral obligation arising from a contract which was void *ab initio* would not constitute valid consideration for a subsequent promise. However, a moral obligation arising out of a contract, not void from the beginning but which "might have been enforced . . . had it not been suspended by some positive rule of law," was recognized.[7] Thus, the courts gave effect to a moral obligation in allowing a new promise to revive debts barred by the Statute of Limitations,[8] by a discharge in bankruptcy,[9] or by infancy.[10] But since at common law coverture was almost universally regarded as rendering a contract void,[11] it was repeatedly held by the greater number of jurisdictions that a contract made by a married woman did not give rise to such a moral obligation as would constitute sufficient consideration to sustain a new promise by her after discoverture.[12] The Pennsylvania courts, however, have consistently recognized as valid consideration the moral obligation created by a married woman's contract.[13] This latter treatment of the coverture cases may be rationalized in either of two ways. It may be contended that Pennsylvania has refused to go along with the majority in outlawing moral obligations springing from void contracts, preferring rather the broad rule laid down by Lord Mansfield in *Atkins v. Hill,*[14] which upheld moral obligation *alone* as good consideration for a subsequent express promise.[15] On the other hand, there are some grounds for reasoning that Pennsylvania has been in fundamental agreement with the majority but has differed only in that it has treated married women's contracts as something less than

5. Besides Pennsylvania, the doctrine of moral consideration still persists to a limited extent in Georgia, Illinois, Louisiana, Maryland and Michigan. See 1 WILLISTON, CONTRACTS §§ 148, 149.

6. 11 A. & E. 438 (Q. B. 1840). The Queen's Bench, in the *Eastwood* case, adopted the view previously expressed in the celebrated reporter's note to the case of Wennall v. Adney, 3 Bos. & P. 247 (C. P. 1802).

7. See 1 WILLISTON, CONTRACTS § 147 et seq.; Note (1922) 17 A. L. R. 1299.

8. Chabot v. Tucker, 39 Cal. 434 (1870); Hulse v. Hulse, 155 Ill. App. 343 (1910); Koons v. Vanconsant, 129 Mich. 260, 88 N. W. 630 (1902). See *supra* note 2.

9. Mutual Reserve Fund Life Ass'n v. Beatty, 93 Fed. 747 (C. C. A. 9th, 1899); Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837 (1886).

10. See Cheshire v. Barrett, 4 M'Cord 241, 244 (S. C. 1827).

11. For the view that a married woman's contract was not void at common law, but that she could actually sue on her contract and that coverture was a defense personal only to the married woman or her husband, see Note (1924) 24 COL. L. REV. 298, 303.

12. Watson v. Dunlap, 29 Fed. Cas. No. 17,282 (C. C. D. C. 1810); Kent v. Rand, 64 N. H. 45, 5 Atl. 760 (1886); Eastwood v. Kenyon, 11 A. & E. 438 (Q. B. 1840). But, even under this majority view, it was agreed that the new promise would be good if the original promise, though unenforceable at law, was binding in equity upon the wife's separate estate. Bibbs v. Davis, 30 Fed. Cas. No. 18,235 (C. C. D. C. 1861). For discussion of moral obligation as consideration in general, and of the coverture cases in particular, see Notes (1901) 53 L. R. A. 353, 366; (1907) 7 L. R. A. (N. S.) 1053; (1910) 26 L. R. A. (N. S.) 520; (1911) 33 L. R. A. (N. S.) 741; (1922) 17 A. L. R. 1299, 1341; (1932) 79 A. L. R. 1346.

13. Hemphill v. McClimans, 24 Pa. 367 (1855); Brooks v. Merchants' Nat. Bank, 125 Pa. 394, 17 Atl. 418 (1889); Holden v. Banes, 140 Pa. 63, 21 Atl. 239 (1891).

14. 1 Cowp. 284 (K. B. 1775).

15. "The obligation is moral solely, and since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not." Muir v. Kane, 55 Wash. 131, 136, 104 Pac. 153, 155 (1909). See also to the same effect Bagaeff v. Prokopik, 212 Mich. 265, 180 N. W. 427 (1920); Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782 (1893).

void.[16] The coverture cases themselves are none too clear as to the correct rationale; nor does a study of other types of moral consideration cases in Pennsylvania offer much in the way of clarification.[17] Regardless of which rationale is accepted, it is something of a novelty to see a modern appellate court applying the old Pennsylvania rule of moral obligation. Perhaps, however, the use of an antiquated doctrine is a justifiable means of dealing with a case involving an antiquated statute of married women's disability.[18]

Corporations—Relaxation of Requirement for Personal Service on Foreign Corporation When It Is Nominal Defendant in a Shareholder's Derivative Suit—Plaintiff, a shareholder in defendant corporation, instituted a representative derivative action against the directors for breach of duty and misconduct, securing personal service on them in New York. The president of the corporation was likewise served in New York. The corporation moved to set aside the attempted service on the ground that it was a foreign corporation not doing business [1] within the State of New York, and that the service was therefore null and void, and in violation of the Fourteenth Amendment. *Held,* that the motion should be denied, since the rule that personal service is only proper within the jurisdiction where the corporation is doing business should not be applied to a suit where the corporation is only a nominal defendant, and is in realty the plaintiff in interest. *Goldberg v. Emanuel,*[2] N. Y. App. Div., 1st Dep't, N. Y. L. J., Jan. 24, 1938, p. 377, col. 7.

It is apparently well settled law in the United States that a corporation must be joined as a party defendant in a shareholders' suit on its behalf.[3] A strict

16. The instant court was careful not to label the original contract of suretyship as "void", but rather said that it was "during her coverture legally invalid as to her." Instant case at 753. The language of the court was equally evasive in Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790 (1906), a similar married woman suretyship case, and, in Young's Estate, 234 Pa. 287, 289, 83 Atl. 201 (1912), the same court cited the *Rathfon* case for the proposition that the wife's "legal exemption from liability was a personal privilege of which she might or might not choose to avail herself" (i. e., the contract of suretyship was voidable and not void).

17. For a collection of moral consideration cases in Pennsylvania, and for a discussion thereof, see McKeehan, *Moral Consideration in Pennsylvania* (1904) 9 THE FORUM 1; Note (1922) 17 A. L. R. 1299.

18. For general discussion and analysis of the married woman statute in each state, see 1 WILLISTON, CONTRACTS §§ 268-269. Under the Act of 1893, PA. STAT. ANN. (Purdon, 1930) tit. 48, § 32, a married woman may ordinarily contract as if *sole,* in Pennsylvania, except that she may not be a surety, etc. Pennsylvania is in the minority in retaining this restriction.

In accord with the instant case are Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790 (1906); First Nat. Bank v. Crawford, 8 Pa. D. & C. 423 (C. P. 1925).

1. The corporation was admittedly not doing business within the State. As to what constitutes "doing business" as a prerequisite to personal jurisdiction over a foreign corporation, see Note (1937) 23 VA. L. REV. 307. An interesting recent decision on the issue is Dineen v. United Air Lines, N. Y. Sup. Ct., N. Y. L. J., Jan. 28, 1938, p. 464, col. 1.

2. The instant decision states in definite terms the view of the Appellate Division of New York concerning jurisdiction over foreign corporations in representative derivative actions by the shareholders for its benefit. For a discussion of the New York cases prior to the instant case see Winer, *Jurisdiction over the Beneficiary Corporation in Stockholders' Suits* (1935) 22 VA. L. REV. 153, 163. Although in Marco v. H. M. Byllesby, 241 App. Div. 714, 269 N. Y. Supp. 1002 (1st Dep't, 1934) the Appellate Division reversed the lower court decision and upheld service on a foreign corporation not doing any business in New York, the court gave no opinion but merely cited two cases, both of which were distinguishable (see Winer, *supra*).

3. Davenport v. Dows, 85 U. S. 626 (1873); STEVENS, CORPORATIONS (1936) 672. For a complete citation of cases see 13 FLETCHER, CORPORATIONS (1932) § 5997; Note (1914) 51

compliance with this rule and the rule of joinder, which requires all parties defendant to be subject to the jurisdiction of the state where the suit is being brought, would compel a dismissal of the instant suit, and thereby render the directors immune so long as they remained outside of the domicile of the corporation.[4] The inequities of such a result are apparent, especially since the corporation plays only a nominal part in the litigation. The instant court avoided this impasse by holding that such a situation calls for an exception to the ordinary requirements of jurisdiction.[5] The obvious necessity for such a decision brings to light the vulnerability of the accepted rule requiring the corporation to be joined as party defendant in representative derivative actions. The rationale given for this rule seems to be that the action will thus be *res judicata* so that the directors will not be subjected again to the same suit,[6] and that the joinder will insure the flow of benefits to the corporation.[7] Curiously enough, such reasons seem to justify the conclusion that the corporation should be joined as *plaintiff* rather than defendant. If this latter conclusion were law, the jurisdictional dilemma in the instant situation would not exist.

Evidence—Admissibility in Federal Court of Evidence Obtained by Tapping Intrastate Telephone Messages—Federal agents intercepted intrastate telephone communications despite the fact that a Massachusetts statute[1] made wire tapping a crime. The conversations were admitted as evidence in a Federal criminal prosecution. *Held* (one justice dissenting), that the evidence was properly admitted as no statute prohibited the disclosure of such messages and the United States Constitution was not violated. *Valli et al. v. United States,* C. C. A. 1st (1938) 5 U. S. L. WEEK 710.

Similar facts occurred in the District of Columbia where there is no statutory prohibition against wire tapping. *Held,* that, on the basis of *Nardone v. United States,*[2] the evidence was inadmissible as being against federal policy. *United States v. Plisco,* Dist. Ct., D. C. (1938) 5 U. S. L. WEEK 724.

The divergence of opinion manifest in these decisions was suggested by a criticism of the *Nardone* case in a recent issue of the REVIEW.[3] Under a strict rule of stare decisis, undoubtedly the *Valli* case represents the correct holding in light of the sanction placed on wire tapping evidence by the Supreme Court in *Olmstead v. United States,*[4] and the fact that the Federal Communications Act,[5]

L. R. A. (N. S.) 123. In England it seems to be the practice to join the corporation as a party plaintiff, Duckett v. Gover, 6 Ch. D. 82 (1877); if at all, Mason v. Harris, 11 Ch. D. 97 (1878).

4. See Finch, J., dissenting in Freeman v. Bean, 243 App. Div. 503, 504, 276 N. Y. Supp. 310, 311 (1st Dep't, 1934).

5. This exact result has been criticized on the ground that such a lax construction of the requirements of jurisdiction is apt to increase the possibilities of so-called "strike suits". See Winer, *supra* note 2, at 165. As an alternative method of securing relief, three possibilities have been suggested: (1) A receiver should be appointed at the corporate domicile to represent the corporation in the foreign action; (2) A mandatory injunction should be sought at the corporate domicile requiring the corporation to appear in the foreign suit; (3) The situation should be handled analogously to garnishment proceedings. See (1935) 44 YALE L. J. 1091 for a discussion of these three possibilities. The objections to each of these alternative suggestions, however, are numerous and practically insurmountable. See Winer, *supra* note 2, at 159; 44 YALE L. J., *supra* at 1092 et seq.

6. STEVENS, *op. cit. supra* note 3.

7. Instant case at p. 388, col. 1.

1. EAVESDROPPING ACT, MASS. GEN. LAWS (1932) c. 272, § 99.

2. 58 Sup. Ct. 275 (1937).

3. 86 U. OF PA. L. REV. 436 (1938).

4. 277 U. S. 438 (1928).

5. 48 STAT. 1064 (1934) 47 U. S. C. A. §§ 151, 605 (Supp. 1937).

on which the *Nardone* decision was based, has no application in the instant situations.[6] However, the court in *United States v. Plisco,* adopting the same view as was taken in the REVIEW, interpreted the *Nardone* case as applying an ethical ban on the disclosure of all intercepted messages, thus, in effect, reversing the *Olmstead* case. Such an interpretation, while not warranted by the actual holding of the Supreme Court, is suggested by the tenor of the opinion and, when the question is finally presented, the district court may well be upheld.

Evidence—Effect of Presumption Against Suicide in Action on Double Indemnity Policy—Effect of State Rule of Evidence in Federal Courts— An insurance policy provided for double indemnity in the event of death effected solely by external, violent, and accidental means. To plaintiff's allegation of accidental death, defendant interposed a general denial and an "affirmative defense" of suicide. Following removal of the cause from the Montana to the federal court, evidence on the issue of suicide was offered by the opposing parties. Charges that the burden of proof on the issue of suicide was on the defendant, and that the plaintiff was favored by a presumption that death was not voluntary were approved by the Circuit Court.[1] On appeal to the Supreme Court of the United States, *held* (Justice Black dissenting), that the charges were error in that the only issue was accidental death and on that issue the plaintiff bore the burden of proof, and in that the presumption was of no effect once evidence sufficient to sustain a finding of non-accidental death was presented. *New York Life Ins. Co. v. Gamer,* U. S. Sup. Ct., (1938) 5 U. S. L. WEEK 691.

The instant decision is notable for two reasons: first, because the Court has steered a careful course amidst the complexities and confusions surrounding presumptions and the burden of proof; second, because the doubts created by the dictum of *Travellers' Ins. Co. v. McConkey*[2] have been clarified. It is axiomatic, according to Thayer-Wigmore doctrine, that the burden of proof, or risk of non-persuasion of the jury, is fixed by the pleadings and does not shift.[3] On the present plaintiff was placed this burden of proving the only issue of the case—accidental death, defendant's allegation of suicide being regarded as surplusage.[4] With the problem of burden of proof determined, the Court was free to consider the entirely separate question of the effect and weight of the presumption against suicide. Presumptions in general are said to affect only the burden of producing evidence and, though they are rules regulating the production of evidence, they are not to be treated as evidence in themselves.[5] Furthermore, once a quantum of evidence in rebuttal of a presumption is offered such as will satisfy the judge that the case should go to the jury, the presumption is said to "disappear" and the

6. The Federal Communications Act deals only with interstate communications.

1. 90 F. (2d) 817 (C. C. A. 9th, 1937).

2. 127 U. S. 661, 667 (1888) (apparently sustaining a charge similar to that in the instant case).

3. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 353 *et seq.;* 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2485-2486; Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof* (1920) 68 U. OF PA. L. REV. 307.

4. Instant case at 692, col. 2; McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967 (1916); Whitlatch v. Fidelity & Casualty Co., 149 N. Y. 45, 43 N. E. 405 (1896). For a view that a redundant affirmative defense shifts the burden of proof, see Boswell v. Pannell, 107 Tex. 433, 180 S. W. 593 (1915).

5. Shepard v. Telegraph Co., 143 N. C. 244, 55 S. E. 704 (1906); 5 WIGMORE, EVIDENCE § 2489. *Contra:* Holzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 9 (1920); Stewart v. Nashville, 96 Tenn. 50, 33 S. W. 613 (1896); Chamberlain v. Larsen, 83 Utah 420, 29 P. (2d) 355 (1934).

instructions should contain no reference to it.[6] It would appear reasonable that no different legal consequences should attach to the presumption against suicide. Indeed, it has been doubted whether there is any justification for the existence of the presumption in the light of statistics indicating the prevalence of self-inflicted death.[7] Nevertheless, it is sometimes argued that since suicide is a crime, the presumption is in the nature of a "presumption of innocence", hence bears weight as evidence, and is chargeable to the jury.[8] But the position taken by the instant court would seem not only to be more compatible with the realities disclosed by mortality statistics but likewise to be more conducive to uniformity and clarity in the law of rebuttable presumptions.

Though the opinions of neither the majority nor of the Circuit Court of Appeals discuss the effect of a state rule of evidence upon the federal courts, the dissenting opinion indicated that an opposite result might have been attained in the instant case by the application of Montana law, which apparently preserves the presumption unless all the evidence points with such certainty to suicide as to "preclude any other reasonable hypothesis".[9] Granting that a presumption is a rule of evidence,[10] it would seem that, as such, it is governed by the Rules of Decision Act[11] and is, by the majority of the circuits, including the Ninth,[12] binding upon the federal courts.[13] The instant decision leaves it open to question whether these holdings are disapproved, in that the majority opinion omits entirely a consideration of the Montana law.

Labor Law—Collateral Attack on Jurisdiction of Court Under Anti-Injunction Statute—Plaintiff sought an injunction to restrain defendants from picketing. The defense claimed the court lacked jurisdiction in that there was a labor dispute within the definition of an anti-injunction[1] act. The court concluded there was not a labor dispute within the meaning of the act and issued a temporary injunction. One defendant ignored the injunction and was sentenced for contempt of court. On certiorari proceeding to review the conviction, *held* (one judge dissenting), that defendant could not attack the injunction collaterally, for the trial court had jurisdiction to consider the case, and the decree was not a nullity even if there were a labor dispute and the decree were erroneous.[2] *Reid v. Independent Union of All Workers,* 275 N. W. 300 (Minn. 1937).

6. "Presumptions . . . may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." Mockowik v. Kansas City, St. Louis & Council Bluffs R. R., 196 Mo. 550, 571, 94 S. W. 256, 262 (1906). Cleveland Cincinnati Chicago & St. Louis Ry. v. Wise, 186 Ind. 316, 116 N. E. 299 (1917). See McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291.

7. Hartman, *The Presumption Against Suicide as Applied in the Trial of Insurance Cases* (1934) 19 MARQ. L. REV. 20.

8. Mutual Life Ins. Co. of New York v. Maddox, 221 Ala. 292, 128 So. 383 (1930). See THAYER, *op. cit. supra* note 3, at 562.

9. Nichols v. New York Life Ins. Co., 88 Mont. 132, 141, 292 Pac. 253, 255 (1930).

10. Bohlen, *loc. cit. supra* note 3.

11. 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1928).

12. Metropolitan Casualty Ins. Co. v. Smith & Smith, 58 F. (2d) 699 (C. C. A. 9th, 1932). It was to the Ninth Circuit that the instant case was first appealed.

13. Leach, *State Law of Evidence in the Federal Courts* (1930) 43 HARV. L. REV. 554, 571. A complete classification of the cases can be found in Sweeney, *Federal or State Rules of Evidence in Federal Courts* (1932) 27 ILL. L. REV. 394. See dictum in Nashua Savings Bank v. Anglo-American Land, Mtg. & Agency Co., 189 U. S. 221, 228 (1903), to the effect that state law is decisive.

1. 3 MINN. STAT. (Mason, Supp. 1936) § 4260-1 *et seq.*

2. The majority opinion did not consider whether or not there was a labor dispute as defined in the statute, at § 4260-12 (c). The concurring opinion, at p. 305, declared there was

On substantially the same facts as above, the defendant instituted a habeas corpus proceeding on the ground the court lacked jurisdiction to issue the injunction. *Held,* that the defendant should be discharged, for since there was a labor dispute as defined by the statute,[3] the court lacked jurisdiction, and the injunction being void could be attacked collaterally.[4] *People ex rel. Sandnes v. Sheriff,* 299 N. Y. Supp. 9 (Sup. Ct. 1937).

In addition to the remedy of direct attack by appeal, the additional right of collateral attack is said to exist where the judgment was void for want of jurisdiction of the court.[5] This formed the basis for the decision in the *Sandnes* case,[6] and for the dissenting opinion in the *Reid* case,[7] both judges feeling that there was in fact a labor dispute and that therefore the order granting the injunction was in each instance a nullity. The majority opinion in the *Reid* case, on the other hand, rested upon the view that where the defendant has appeared and contested the fact of jurisdiction, a decision by the court that it has jurisdiction may be questioned only by appeal.[8] Where jurisdiction over the person is concerned, this view is approved by the *Restatement of Conflicts.*[9] However, in the instant cases, the question related to the jurisdiction of the court over the subject matter. On that problem the *Restatement* takes no position.[10] But it is questionable whether any sound distinction exists. There would appear to be no actual difference in any practical considerations that may be involved. In either situation, the effect of denying the right of collateral attack is that the court has by its own proclamation acquired jurisdiction where it had none.[11] However, the court in each case was of the opinion that some considerations of policy existed. The majority in the *Reid* case thought that where a party submitted a question to the court for decision, deference to its judgment pending appeal was preferable to an omission to observe the decree pending collateral attack.[12]

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not such a dispute, as the issue between employer and union was the scale of prices to be charged to customers. The dissenting opinion, at p. 306, held that there was a labor dispute as defined by statute.

3. The New York statute is found in N. Y. Civ. Prac. (Cahill, Supp. 1936) § 876-a.

4. There was another ground on which the decision was based. The court had not observed the statutory procedure. The order to show cause why a temporary injunction should not be issued was not served on the defendant, for at the same time that this order was issued, the court also issued the temporary injunction. But it is plain from the language of the court that it would have decided in the same way if the only issue had been lack of jurisdiction, and there had been no procedural defect.

5. Thompson v. Whitman, 18 Wall. 457 (U. S. 1874); Dehman v. McGuire, 101 N. Y. 161, 5 N. E. 278 (1886); Fisher v. Longnecker, 8 Pa. 410 (1848).

6. *Sandnes* case at p. 13, citing People *ex rel.* Tweed v. Liscomb, 60 N. Y. 559, at 568 (1875).

7. *Reid* case at p. 309.

8. *Id.* at 301.

9. Restatement, Conflict of Laws (1934) § 451. Accord: Baldwin v. American Surety Co., 287 U. S. 156 (1932); National Park Bank v. McKibben, 43 F. (2d) 254 (M. D. Ga. 1930); Ellis v. Starr Piano Co., 49 S. W. (2d) 1078 (Kan. City Ct. App., Mo. 1932).

10. Restatement, Conflict of Laws (1934) § 451, caveat. That the judgment is binding until appeal, Des Moines Nav. Co. v. Iowa Homestead Co., 123 U. S. 552 (1887); Catholic Society v. Madison County, 74 F. (2d) 848 (C. C. A. 4th, 1935); Hamilton Gas Co. v. Watters, 79 F. (2d) 438 (C. C. A. 4th, 1935). *Contra:* Farmers' Nat. Bank v. Daggett, 2 S. W. (2d) 834 (Comm. App. Tex. 1928).

11. See Arnold and James, Cases on Trials, Judgments, and Appeals (1936) 133, where they make this point, but state that there should be no distinction made between jurisdiction over the person and over the subject matter and illustrate the point with diagrams to show that in absence of collateral attack there is less complication.

12. The court, at p. 304, said that the alternative to an appeal was for "those affected thereby to decide for themselves what laws to obey and when; what judgments to fulfill and what to violate. Such ruinous cultivation of the fields of democracy and the consequent evacuation thereof by the farm hands of orderly administration under law, without whose faithful tillage no harvest of democracy can ripen, was of all things not contemplated by the statute."

The dissenting opinion,[13] and the court in the *Sandnes* case,[14] evidently considered that the benefits of the statute might be weakened by the delay while the injunction was in effect. This possibility should be considered, but it is significant that under both statutes involved in these cases, appeal proceedings were accelerated.[15] These provisions would not only mitigate the effects of delay, but would seem to indicate a legislative intent that a misconstruction of the act by a lower court should be remedied by appeal.

Pleading—Refusal to Allow Counterclaim for Breach of Warranty in a Conditional Sale as a Defense in Action of Replevin—Under the terms of a contract of conditional sale, the plaintiff vendor was permitted to retake possession of the goods upon default in payments by the vendee. When defendant defaulted, plaintiff brought an action of replevin; defendant pleaded property in himself and gave notice of recoupment under a provision of the Sales Act [1] which allows the buyer to keep the goods and set up breach of warranty "in diminution or extinction of the price." On motion to strike the notice of recoupment *held,* that the motion should be granted, because in Delaware, a common law state, recoupment is unavailable as a defense to an action of replevin. *Mills Novelty Co. v. Transeau,* 196 Atl. 187 (Del. 1937).

The dogma of the common law does not countenance set-off or counterclaim as a defense to replevin on the theory that the only issue involved is the plaintiff's right to the immediate possession of the goods,[2] and that, therefore, the equities of the defendant are out of place.[3] But this is by no means the universal rule today. The newer view would permit such a defense [4] as a means of abolishing circuity of action, and for the further reason that, in a conditional sale, the vendor's right to take possession of the goods depends upon a sum due him by the vendee, and if the vendee has been damaged to an extent equal to or greater than the amount then owing the vendor, the basis of the right of the vendor to retake possession of the goods is destroyed.[5] Although the instant

13. *Reid* case at 314.
14. *Sandnes* case at 16.
15. 3 MINN. STAT. (Mason, Supp. 1936) § 4260-9; N. Y. CIV. PRAC. (Cahill, Supp. 1936) § 876-a (9).

1. UNIFORM SALES ACT § 69 (1) (a).
2. ". . . the right in plaintiff to possession of the property in dispute . . . is the only question to be tried." Dearing Water Co. v. Thompson, 156 Mich. 365, 369, 120 N. W. 801, 803 (1909). Delaware Marine Supply Mfg. Co. v. Philadelphia Lamp Mfg. Co., 5 Boyce 524, 95 Atl. 235 (Del. 1915); McCargar v. Wiley, 112 Ore. 215, 229 Pac. 665 (1924), 34 YALE L. J. 330; Lee-Strauss Co. v. Kelly, 292 Pa. 403, 141 Atl. 236 (1928); Singer Mfg. Co. v. Smith, 40 S. C. 529, 19 S. E. 132 (1894); *cf.* Zimmerman v. Sunset Lumber Co., 57 Ore. 309, 111 Pac. 690 (1910); COBBEY, REPLEVIN (2d ed. 1900) § 791; WELLS, REPLEVIN (2d ed. 1907) § 630.
3. But note an exception made in Cobbey: ". . . but where the claim of the plaintiff is based upon the fact that a certain sum is due him, it is permissible to show that nothing is due him, and consequently he has no right of possession." COBBEY, *loc. cit. supra* note 2. Compare this statement with that found in POMEROY, CODE REMEDIES (5th ed. 1928) *767 to the effect that even in replevin the equities of the litigants will be ascertained in *"exceptional"* circumstances. (Italics added.) The statement found in Cobbey is the identical reasoning of the *Peuser* case, *infra* note 4, which holds directly *contra* to the instant case.
4. McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544, 79 S. W. 745 (1904); Peuser v. Marsh, 218 N. Y. 505, 113 N. E. 494 (1916), *aff'g,* 167 App. Div. 604 (1915), 1 CORN. L. Q. 126; Wilson v. Hughes, 94 N. C. 182 (1886); Holmberg v. Will, 52 Okla. 745, 153 Pac. 832 (1915), 16 COL. L. REV. 358; Zimmerman v. Sunset Lumber Co., 57 Ore. 309, 111 Pac. 690 (1910).
5. CLARK, CODE PLEADING (1928) § 99, n. 61, in commenting upon the *Peuser* case, *supra* note 4, seems to feel that the facts of that case are an exception to the general rule. The writer is more inclined to believe that the reasoning of the *Peuser* case is not to allow for an exception, but to state the rationalization for a better rule of law.

court implied that this division of authority is paralleled by the division of states which have adopted codes of civil procedure and those which have not, this is not absolutely so. Even in a code state the defense may be unavailable, being expressly barred by the statute dealing with recoupment, counter-claim, and set-off,[6] while in at least one common law state the defense is allowed for the reasons stated above.[7] In those jurisdictions where the plea of counterclaim is available to defeat replevin, there is a further split of authority. Under one view the defendant may even receive a money judgment against the plaintiff if his damage exceeds the amount owing the plaintiff,[8] thus permitting a resolution of all existing controversies at one trial. But a few jurisdictions permit the plea only as it is necessary to defeat the cause of action and no further.[9] As to the form in which the defense is to be pleaded: some jurisdictions require that it be specially alleged; others allow it to be proved under a general denial.[10] Although the Sales Act fails to specify that the remedies of the buyer under § 69 (1) apply either to an action for the purchase price or to one of replevin, it is probable that it was not the intention of the legislatures to differentiate between the two types of actions.[11] But although the instant court was bound by no controlling decisions of its own,[12] it felt obliged to follow the majority of decisions in other common law states and to indicate that the advantages of the more liberal view must be reserved for those states that have adopted code pleading.

Real Property—Equitable Easements—Restraints on Alienation—A group of property owners agreed in a recorded writing that their respective properties should never be occupied or used by negroes. One of the covenanting parties sold his property to defendant, a negro, and a bill in equity was brought to restrain defendant from using or occupying the premises. *Held* (one dissent), injunction granted. The instrument created mutual easements, which did not result in unreasonable restraints on alienation but only restrained use and occupation.[1] *Meade v. Dennistone et al,* 196 Atl. 330 (Md. 1938).

6. Sylvester v. Ammons, 126 Iowa 140, 101 N. W. 752 (1904).

7. Zimmerman v. Sunset Lumber Co., 57 Ore. 309, 111 Pac. 690 (1910).

8. Deford v. Hutchinson, 45 Kan. 318, 25 Pac. 641 (1891); McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544, 79 S. W. 745 (1904); Wilson v. Hughes, 94 N. C. 182 (1886); Holmberg v. Will, 52 Okla. 745, 153 Pac. 832 (1915), 16 COL. L. REV. 358. See also the collection of code statutes allowing the same remedy: CLARK, *op. cit. supra* note 5, n. 63.

9. Baldwin v. Burrows, 95 Ind. 81 (1884); Zimmerman v. Sunset Lumber Co., 57 Ore. 309, 111 Pac. 690 (1910).

10. For a complete discussion of this point and a collection of cases see Note 34 L. R. A. (N. S.) 473 (1911).

11. ". . . the legislative intent to permit this to be done is discoverable in the language of the statute—whether seller sues for the purchase price or sues to recover back the goods." Peuser v. Marsh, 218 N. Y. 505, 508, 113 N. E. 494, 495 (1916).

12. The Delaware case cited *supra* note 2 was decided prior to the enactment of the Sales Act in that state.

1. It was held that the enforcement of the agreement did not not violate the equal protection clause of the Fourteenth Amendment. It is well established law that the inhibition of the Fourteenth Amendment applies only to acts of the state and has no reference to acts of individuals. See (1930) 79 U. OF PA. L. REV. 220.

It was also held that the character of the neighborhood had not sufficiently changed to justify removing the restriction. For a discussion of the rule that equity will not enjoin the breach of a restrictive covenant when changes in the character of the neighborhood defeat the purposes of the restriction, see (1937) 85 U. OF PA. L. REV. 740.

Since the case of *Tulk v. Moxhay*[2] the doctrine has been well established in equity that one who takes land with notice of a restriction upon it is bound by the restriction.[3] Such restrictions are usually imposed in connection with the conveyance of land,[4] but they may result, as in the instant case, from an agreement between adjoining owners in regard to the use of their land.[5] While the general tendency of equity has been to treat restrictions as servitudes or easements on the land,[6] the use of the term "easement" to describe the concept is unfortunate since at law the agreement would be regarded ordinarily as creating a contract right only.[7] As has been pointed out by respectable authority,[8] a more satisfactory theory of the enforceability of such an agreement would be that it is a contract concerning land which equity regards as specifically enforceable not only against the original promisor but also against a subsequent holder of the property with notice.

In cases involving restrictions like that in the instant case the further question arises whether the contract or restriction may still be void as an unreasonable restraint on alienation. The majority of courts regard restraints against alienation to a particular race as valid,[9] but a strong minority declare them void.[10] However the minority, wherever possible, construe the restraint as one against use and occupation and not one against alienation,[11] so that the actual effect of the restraint is often the same in either a majority or minority jurisdiction. While there is a theoretical distinction between a restraint on use and occupation and a restraint on alienation, the practical effect of the former is to

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2. 2 Phil. 774 (Ch. 1848).

3. Continental Oil Co. v. Fennemore, 38 Ariz. 277, 299 Pac. 132 (1931); Godfrey & Candler v. Huson, 180 Ga. 483, 179 S. E. 114 (1935); Cuneo v. Chicago Title & Trust Co., 337 Ill. 589, 169 N. E. 760 (1930); Clem v. Valentine, 155 Md. 19, 141 Atl. 710 (1928); Cotton v. Cresse, 80 N. J. Eq. 540, 85 Atl. 600 (1912).

4. E. g., Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918); see cases cited *supra* note 3.

5. Russell v. Wallace, 30 F. (2d) 981 (App. D. C. 1929); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Trustees of Col. College v. Lynch, 70 N. Y. 440 (1877); see 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1426 and cases cited there.

6. See instant case at 334; 2 TIFFANY, REAL PROPERTY 1434 and cases cited there. For authorities supporting this view see WALSH, EQUITY (1930) §§ 99, 100; Clark, *The Assignability of Easements, Profits, and Equitable Restrictions* (1928) 38 YALE L. J. 139; Pound, *Progress of the Law; Equitable Servitudes* (1920) 33 HARV. L. REV. 813.

7. See 2 TIFFANY, REAL PROPERTY 1436; Clark, *supra* note 6, at 156; *Stone, The Equitable Rights and Liabilities of Strangers to a Contract* (1918) 18 COL. L. REV. 291, 292, 297.

8. 2 TIFFANY, REAL PROPERTY 1436; Ames, *Specific Performance For and Against Strangers to a Contract* (1904) 17 HARV. L. REV. 174; *Stone, supra* note 7 (1918) 18 COL. L. REV. 291, (1919) 19 *id.* 177.

9. Corrigan v. Buckley, 271 U. S. 323 (1926); Torrey v. Wolfes, 6 F. (2d) 702 (App. D. C. 1925); Russell v. Wallace, 30 F. (2d) 981 (App. D. C. 1929), *cert. denied*, 279 U. S. 871 (1930); Cornish v. O'Donoghue, 30 F. (2d) 983 (App. D. C. 1929), *cert. denied*, 279 U. S. 871 (1930); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918).

10. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Title Guaranty & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470 (1919); Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925); White v. White, 108 W. Va. 128, 150 S. E. 531 (1929).

11. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Janss Investment Co. v. Walden, 196 Cal. 753, 239 Pac. 34 (1925); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Littlejohns v. Henderson, 111 Cal. App. 115, 295 Pac. 95 (1931); Parmelee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922); Schulte v. Starks, 238 Mich. 102, 213 N. W. 102 (1927); *cf.* Title Guaranty & Trust Co. v. Garrott, 42 Cal. App. 152, 183 Pac. 470 (1919); Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925); White v. White, 108 W. Va. 128, 150 S. E. 531 (1929). In these latter cases the validity of a restraint on use and occupation was acknowledged, but the courts found it impossible to construe the restraint as such.

exclude members of the restricted race from the field of potential purchasers.[12] Since the Maryland court was not committed directly to the minority view previous to the instant case,[13] it might have avoided the subtle distinction necessary to hold the restraint valid under the minority view by declaring that a prohibition against alienation to a particular race was not void and that, therefore, *a fortiori* a restraint against use and occupation was valid.

Trusts—Refusal to Apportion Irregular but "Ordinary" Cash Dividend—Testator left shares of corporate stock in trust, income to be paid to tenant for life with remainder over. The corporation, which had no regular dividend policy, declared a cash dividend about nine months after the testator's death and two years after the last dividend had been paid. *Held,* that the entire cash dividend should be awarded to the life tenant, because (1) this irregular dividend was not of the character contemplated by a statute providing for a per diem apportionment of dividends from trust property,[1] and (2) the dividend was not an "extraordinary" dividend subject to equitable apportionment according to the period when the dividend was earned by the corporation.[2] *Zell v. Safe Deposit and Trust Co.,* 196 Atl. 298 (Md. 1938).

The court in the instant case was faced with the same problem and arrived at the same conclusion as the court in the recent Pennsylvania case of *Nirdlinger's Estate (No. 1),*[3] discussed in a previous issue of the REVIEW.[4] Although the point had not previously been decided in Maryland, the instant court, in refusing to apply the apportionment statute to an irregular dividend, followed the construction that has been given similar statutes [5] in other jurisdictions both here and in England.[6] The instant court also decided that "this ordinary cash dividend may not be designated as extraordinary" and hence is not subject to equitable apportionment.[7] No reasons for this part of the holding were set forth in the opinion, and it was not indicated whether the cash form of the payment controlled its classification as ordinary. Hence it is conjectural whether the instant court was influenced by the dictum in *Nirdlinger's Estate (No. 1)* [8] which implied that a straight cash dividend could not be considered extraordinary. It is unfortunate that the Maryland court did not settle the question more definitely, for prior decisions of that state are curiously confused on the subject of cash dividends. After adopting the "Pennsylvania" rule of apportionment in the rather inconclusive opinion of *Thomas v. Gregg,*[9] the Maryland

12. See Schnebly, *Retraints Upon the Alienation of Legal Interests* (1935) 44 YALE L. J. 1186, 1193.

13. The court cited the case of Clark v. Clark, 99 Md. 356, 58 Atl. 24 (1904), in which a prohibition against devisees selling property for ten years was held void, and apparently regarded the language of that case as precluding any possibility of holding a restraint on alienation to a particular race valid.

1. MD. CODE ANN. (Flack, Supp. 1935) art. 93, § 305c.

2. This is known as the "Pennsylvania doctrine", first announced in Earp's Appeal, 28 Pa. 368 (1857). For general discussion of this and opposing views, see 4 BOGERT, TRUSTS AND TRUSTEES (1935) §§ 841-857.

3. 327 Pa. 160, 193 Atl. 33 (1937).

4. (1937) 86 U. OF PA. L. REV. 111.

5. *E. g.,* PA. STAT. ANN. (Purdon, 1930) tit. 20, § 634.

6. See instant case at 301-302 for discussion of these statutes and their application.

7. *Id.* at 302. See *supra* note 2.

8. 327 Pa. 160, 168, 193 Atl. 33, 37 (1937). The case was cited and quoted in the instant opinion on the statutory issue.

9. 78 Md. 545, 28 Atl. 565 (1894).

court seemed to follow the "Massachusetts" rule[10] in refusing to apportion a cash dividend in *Quinn v. Safe Deposit and Trust Co.*[11] This latter holding was in turn confined to its peculiar facts in *Foard v. Safe Deposit and Trust Co.*[12] where the "Pennsylvania" rule was again approved and a straight cash dividend apportioned. But the following year, the court in the *Northern Central Dividend Cases*[13] refused to apportion a cash dividend on the authority of the *Quinn* case (citing but ignoring the *Foard* case) and granted apportionment of a stock dividend on the authority of *Thomas v. Gregg.* Apparently none of the above cases have been overruled; nor have any subsequent Maryland cases been found where it was necessary to decide whether a straight cash dividend is subject to apportionment.[14] It is true that the language of later opinions is in harmony with the orthodox rule that extraordinary dividends are apportionable in Maryland "whether declared in cash or in stock".[15] But in view of the conflict of the earlier holdings, Maryland might have more justification than Pennsylvania for departing from the orthodox doctrine.

10. In Massachusetts, dividends from earnings are not apportioned; the courts of that state simply award all cash dividends to tenant and all stock dividends to remainderman. Minot v. Paine, 99 Mass. 101 (1868).

11. 93 Md. 285, 48 Atl. 835 (1901). The Maryland law was further confused by the opinion in The Atlantic Coast Line Dividend Cases, 102 Md. 73, 61 Atl. 295 (1905), where the court awarded an extra stock dividend to the tenant for uncertain reasons.

12. 122 Md. 476, 89 Atl. 724 (1914).

13. 126 Md. 16, 94 Atl. 338 (1915). Followed as to stock dividends in Miller v. Safe Deposit and Trust Co., 127 Md. 610, 96 Atl. 766 (1916).

14. In Krug v. Mercantile Trust and Deposit Co., 133 Md. 110, 104 Atl. 414 (1918), a dividend of shares of another corporation was treated as if it were a cash dividend, but since it was earned by the original corporation wholly within the period of the trust, no problem of apportionment arose. Spedden v. Norton, 159 Md. 101, 150 Atl. 15 (1930) involved a cash liquidating dividend, rather than a dividend from earnings.

15. Baldwin v. Baldwin, 159 Md. 175, 178, 150 Atl. 282, 283 (1930). See also Spedden v. Norton, 159 Md. 101, 105, 150 Atl. 15, 17 (1930). It was pointed out in the latter case that the prior Maryland cases were not inconsistent on their facts with the principle that extraordinary cash dividends are apportionable.